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9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11 WESTERN DIVISION

12 DAVID L. DEFREES, SIMON
13 GERSHON, and FREDERICK RICH,
in the right of and for the benefit of U.S.
14 Aerospace, Inc.,

15 Plaintiffs,

16 v.

17 JOHN C. KIRKLANDL; LUCE,
FORWARD, HAMILTON & SCRIPPS,
18 LLC; MICHAEL C. CABRAL;
JERROLD PRESSMAN; KENNETH J.
19 KOOCK; MICHAEL J. GOLDBERG;
JAMES D. HENDERSON; CHARLES
20 S. ARNOLD; TUSA ACQUISITION
CORPORATION; AMERICAN
21 DEFENSE INVESTMENTS, LLC; and
DOES 1 through 10,

22 Defendants,
23
24
25 and
26 U.S. AEROSPACE, INC.,
27 Nominal Defendant.
28

Case No.: CV11 04272 GAF (SPx)

[Related to Case No. CV11-04574
GAF (SPx)]

Assigned to Hon. Gary A. Feess

Date: July 30, 2012

Time: 9:30 a.m.

Ctrm: 740

**REPLY MEMORANDUM IN
SUPPORT OF MOTION BY
DEFENDANT MCKENNA LONG
& ALDRIDGE LLP TO CERTIFY
APPEAL UNDER 28 U.S.C.
§ 1292(b)**

Complaint Filed: May 26, 2011

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INTRODUCTION

Luce Forward's motion demonstrated that reasonable jurists could reject application of the crime-fraud exception to USAE's confidential communications with Luce Forward attorneys because the exception applies only if the *client*—*i.e.*, USAE—intended to commit a crime or fraud, and there is no allegation, much less evidence, that this happened. Plaintiffs' volley of baseless arguments, resting on inapposite authority, utterly fails to refute this basic point.

Most notably, plaintiffs still have not identified any law or evidence suggesting that the client's intent is not controlling or that USAE intended to defraud anyone. Plaintiffs do not dispute Luce Forward's point that the complaints' allegations do not constitute evidence, and they ignore that both the complaints and the Akin Gump Memo, as well as the other purported evidence they identify as "substantiating" the complaints, portrays USAE as a victim, not a perpetrator, of fraud. Plaintiffs also argue that the Director Defendants' intent to defraud should be imputed to USAE, but again they ignore that the intended victim of the purported fraud was USAE—and USAE cannot defraud itself. Moreover, California law makes it clear that the Director Defendants' alleged fraudulent intent is not attributable to USAE for purposes of the crime-fraud exception because, according to plaintiffs' own theory and this Court's prior findings, the Director Defendants were acting adversely to USAE and hence not on behalf of USAE in connection with the allegedly fraudulent transactions.

Plaintiffs also argue that USAE has recently waived the attorney-client privilege as to its communications with Luce Forward attorneys by relying on certain privileged communications in connection with its motion for a bond. But given that this Court has already determined that the crime-fraud exception negates any such privilege, USAE's reliance on the documents cannot constitute a waiver. In any case, even if USAE could be deemed to have waived the privilege, the waiver would not extend beyond the particular documents disclosed. Since there has been

1 no wholesale waiver of the privilege as to USAE's communications with Luce
2 Forward, Luce Forward is still foreclosed from defending itself effectively in the
3 lawsuit, and *McDermott, Will & Emery v. Superior Court*, 83 Cal.App.4th 378
4 (2000) requires dismissal.

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ARGUMENT

I. THE ORDER DENYING LUCE FORWARD’S MOTION TO DISMISS INVOLVES A CONTROLLING QUESTION OF LAW, AND AN IMMEDIATE APPEAL IS LIKELY TO MATERIALLY ADVANCE THE TERMINATION OF THE LITIGATION.

A. Certification Is Proper Because The Court’s Construction Of California Law Regarding The Crime-Fraud Exception Presents A Pure Question Of Law.

Luce Forward’s motion showed that this Court’s order involves a “controlling question of law”—whether the attorney-client privilege prevents disclosure of communications between USAE and Luce Forward—and an immediate appeal may “materially advance the ultimate termination of the litigation,” because if the Ninth Circuit reverses this Court’s determination that such communications may be disclosed, *McDermott* requires dismissal of the action against Luce Forward. 28 U.S.C. § 1292(b). (Luce Forward’s Motion to Certify Appeal 5-19 [CAM Funds Docket #175; Defrees Docket #165] [hereinafter “LF Mot. To Certify”].)

Plaintiffs contend that certification is improper because the Court’s order will require the Ninth Circuit to review factual matters. (CAM Funds’ Opp’n to LF Mot. to Certify 6-8 [CAM Funds Docket #186] [hereinafter “CAM Funds Opp.”]; Defrees’ Opp’n to LF Mot. to Certify 13-15 [Defrees Docket #180] [hereinafter “Defrees Opp.”].) Not so.

1. The order turns on purely legal questions.

This Court’s interpretation of California law regarding the crime-fraud exception presents a pure question of law. At the very least, whether the crime-fraud exception applies where there is no evidence that the corporate client intended fraud—as well as whether corporate directors’ intent can be imputed to the corporation for purposes of the crime-fraud exception if they are acting adversely to

1 it—are pure questions of law that permit the Ninth Circuit to resolve all questions
 2 material to the order. *Steering Committee v. United States*, 6 F.3d 572, 575-76 (9th
 3 Cir. 1993).

4 **2. Factual questions can be reviewed.**

5 As noted in Luce Forward’s motion, the Ninth Circuit has held that
 6 certification is proper even if the issue to be reviewed involves factual as well as
 7 legal determinations. *See Steering Committee*, 6 F.3d at 575-76. In *Steering*
 8 *Committee*, the district court certified for interlocutory review “all liability issues” in
 9 the liability phase of a bifurcated trial. *Id.* at 575. Even though those issues
 10 involved both pure questions of law and mixed questions of law and fact, the Ninth
 11 Circuit held that determination of the liability issue itself constituted a controlling
 12 question of law. *Id.* The court reasoned that certification of the liability issue—
 13 unlike certification of ““numerous and sundry pretrial motions””—would not violate
 14 the ““expressed federal disfavor towards premature piecemeal appeals,”” and might
 15 “avoid the delay and expense” of taking evidence on damages, which would be
 16 unnecessary if the liability determination were reversed. *Id.* at 575 & n.1.

17 The court further noted that the liability issue involved a pure legal question,
 18 which “permit[ted] the court to resolve all questions material to the order.” *Id.* at
 19 575-76. The court explained that “although section 1292(b) requires certification
 20 . . . of ‘controlling’ questions of law, the appeals it authorizes are from orders not
 21 questions.” *Id.* at 576. The Ninth Circuit and the Supreme Court have repeatedly
 22 reaffirmed this point. *E.g.*, *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir.
 23 2004); *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 204-05 (1996); *In re*
 24 *Cinematronics, Inc.*, 916 F.2d 1444, 1448-49 (9th Cir. 1990); *see also Abarca v.*
 25 *Merck & Co.*, 2012 WL 137749, at*4-*5 (C.D. Cal. Jan. 17, 2012) (explaining that a
 26 pure legal question allows the Ninth Circuit to consider other material mixed
 27 questions of law and fact).

28

Contrary to plaintiffs' assertion, *Steering Committee* is on point. Here, the Court's ruling that the attorney-client privilege does not prevent disclosure of communications between USAE and Luce Forward is not just another pretrial ruling, but a key ruling that precludes the otherwise required dismissal of the case against Luce Forward. Thus, certification will not encourage piecemeal appeals on collateral issues, and it will likely avoid wasting significant resources on the trial of unnecessary issues.

Plaintiffs' numerous apparently contrary authorities (CAM Funds Opp. 6-8; Defrees Opp. 13-15) are all from other circuits or district courts—the latter mostly unpublished—and are not binding on this court. Indeed, *Weisman v. Darneille*, 78 F.R.D. 671, 674 (S.D.N.Y. 1978), cited by the Defrees plaintiffs (Defrees Opp. 14 n.9), was expressly repudiated in *Steering Committee*, 6 F.3d at 575. Moreover, *McFarlin v. Conseco Services, LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004), confirmed that interlocutory review is proper where “there is substantial dispute about the correctness of any of the pure law premises the district court actually applied in its reasoning leading to the order sought to be appealed,” and resolution of the legal question will “substantially reduce the amount of litigation left in the case”—exactly the situation here. And *Laser Industries, Ltd. v. Reliant Technologies, Inc.*, 167 F.R.D. 417, 439 n.36 (N.D. Cal. 1996), noted that appellate courts, including the Ninth Circuit, are likely to intervene on an interlocutory basis to correct erroneous privilege rulings if the district judge “has made an error of law that is both clear and important”—again, the situation here.

3. These are exceptional circumstances.

Plaintiffs further contend that certification is improper absent “exceptional circumstances.” (Defrees Opp. 7, 23; CAM Funds Opp. 3-4.) Even if plaintiffs are correct, such circumstances exist here because an interlocutory appeal “would avoid protracted and expensive litigation” by eliminating Luce Forward from the lawsuit without a trial. *See In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir.

1 1982), *aff'd*, 459 U.S. 1190 (1983). Moreover, the Supreme Court has noted that
 2 certification is particularly appropriate “when a privilege ruling involves a new legal
 3 question or is of special consequence.” *Mohawk Industries, Inc. v. Carpenter*, 130
 4 S. Ct. 599, 607 (2009). Contrary to plaintiffs’ assertion, *Mohawk* is directly on
 5 point. This Court’s ruling that the crime-fraud exception negates the attorney-client
 6 privilege is critical because it directly determines whether the case can proceed as to
 7 Luce Forward. Moreover, whether the crime-fraud exception applies in a derivative
 8 suit where there is no evidence that the corporate client intended to defraud anyone
 9 presents a new legal question that no California case has directly addressed.

10 *United States v. Woodbury*, 263 F.2d 784 (9th Cir. 1959), cited by the Defrees
 11 plaintiffs, actually confirms the appropriateness of certification. (Defrees Opp. 10-
 12 11.) *Woodbury* noted that certification is an appropriate means to expedite litigation
 13 “by permitting appellate consideration during the early stages of litigation of legal
 14 questions which, if decided in favor of the appellant, would end the lawsuit.” 263
 15 F.2d at 787. The court further noted that an issue may be “controlling” even if it
 16 does not dispose of the entire lawsuit. *Id.* However, the court refused to certify a
 17 discovery order requiring production of arguably privileged documents, because the
 18 privilege issue did not affect the main issues in the lawsuit. *Id.* at 787-88. The order
 19 here does not involve a collateral discovery matter—it goes to the heart of the case
 20 against Luce Forward.

21 **B. Certification Will Materially Advance The Ultimate Termination**
 22 **Of The Litigation Even If This Court Orders A Conditional Stay.**

23 Plaintiffs contend that an immediate appeal will not “materially advance the
 24 ultimate termination of the litigation” under 28 U.S.C. § 1292(b) because at most,
 25 application of the *McDermott* rule would result in a conditional stay rather than
 26 dismissal. (CAM Funds Opp. 15-16; Defrees Opp. 12-13.) But as Luce Forward
 27 explained (LF Mot. to Certify 5-6), the Ninth Circuit has repeatedly noted that
 28 certification is proper even if resolution of an issue does not terminate the action—

1 rather, it is sufficient if “resolution of the issue on appeal could materially affect the
 2 outcome of litigation in the district court.” *In re Cement Antitrust Litigation*, 673
 3 F.2d at 1026; *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir.
 4 2011) (appeal would materially advance litigation, where reversal of rulings
 5 partially denying motion to dismiss might remove a defendant and plaintiff’s control
 6 claims against the remaining defendants); *see Kuehner v. Dickinson & Co.*, 84 F.3d
 7 316, 319 (9th Cir. 1996) (certifying order staying proceedings pending arbitration,
 8 because the order “could cause the needless expense and delay of litigating an entire
 9 case in a forum that has no power to decide the matter”).

10 If the Ninth Circuit reverses this Court’s determination that USAE’s
 11 confidential communications with Luce Forward must be disclosed, *McDermott*
 12 ultimately requires dismissal of the action against Luce Forward absent a waiver of
 13 the privilege or evidence to support the crime-fraud exception. (LF Mot. to Certify
 14 7-8.) Thus, an interlocutory appeal will prevent unnecessary disclosure of
 15 privileged information—a disclosure that, for all practical purposes, can never be
 16 remedied—and will save the parties and this Court the needless expense of a full
 17 trial on the merits, including years of litigation, potentially followed by a lengthy
 18 and unnecessary appeal.

19 Even if this Court merely stayed the action against Luce Forward while the
 20 litigation continued against the other parties, the interlocutory appeal could still
 21 “materially affect the outcome” of the litigation: Unless USAE eventually elected to
 22 waive the privilege during the course of the litigation or subsequent evidence arose
 23 establishing the crime-fraud exception, the case against Luce Forward would
 24 eventually be dismissed or disposed of by summary judgment under *McDermott*,
 25 again saving the delay and expense of litigating and appealing unnecessary issues.
 26 Moreover, even a conditional stay would ensure that privileged communications
 27 were not erroneously disclosed based on a premature conclusion that the crime-
 28 fraud exception applies. Although plaintiffs assert that USAE has already waived

1 the attorney-client privilege as to certain communications with Kirkland, there is no
 2 indication that USAE has waived the privilege as to most or all of its relevant
 3 communications with Luce Forward. (*See* §II.B, *infra*.)

4 Plaintiffs further argue that even if plaintiffs' claims against Luce Forward
 5 were dismissed, their claims against the other defendants would remain. (Defrees
 6 Opp. 12.) Again, certification is proper even if it does not dispose of the entire
 7 litigation as to all parties, as long as it "materially affect[s] the outcome." *Reese*,
 8 643 F.3d at 688; *In re Cement Antitrust Litigation*, 673 F.2d at 1026.

9 The Defrees plaintiffs further argue that an interlocutory appeal would create
 10 a conflict between the claims against Luce Forward and Kirkland, because Luce
 11 Forward could raise issues on appeal that plaintiffs and Kirkland would have to
 12 accept as already decided in this Court. (Defrees Opp. 22-23.) But if certification is
 13 granted, this Court could stay the proceedings against Kirkland pending disposition
 14 of the appeal. If the Ninth Circuit reverses this Court's order applying the crime-
 15 fraud exception, that holding may require dismissal of the action as to Kirkland, thus
 16 avoiding the expense of an unnecessary trial as to him as well and ensuring that
 17 privileged communications are not disclosed inappropriately.

18 **II. THERE ARE SUBSTANTIAL GROUNDS FOR A DIFFERENCE OF**
 19 **OPINION AS TO WHETHER THE ATTORNEY-CLIENT**
 20 **PRIVILEGE PREVENTS DISCLOSURE OF COMMUNICATIONS**
 21 **BETWEEN USAE AND LUCE FORWARD SO AS TO REQUIRE**
 22 **DISMISSAL UNDER *MCDERMOTT*.**

23 Luce Forward demonstrated in its motion (LF Mot. to Certify 9-19) that
 24 certification is proper because there is a "substantial ground for difference of
 25 opinion" regarding this Court's conclusion that the attorney-client privilege does not
 26 protect USAE's communications with Kirkland or other Luce Forward attorneys.
 27 28 U.S.C. §1292(b). Specifically, reasonable judges could conclude that the crime-
 28 fraud exception to the attorney-client privilege is inapplicable because the exception

1 applies only if the *client* intended to commit a crime or fraud, and there is no
 2 evidence that USAE, the client here, had such an intent. (LF Mot. to Certify 13-19.)
 3 Contrary to plaintiffs' assertion, Luce Forward does not merely disagree with the
 4 Court's ruling or its application of settled law to the facts. (See CAM Funds Opp. 9;
 5 Defrees Opp. 15-16.) Rather, Luce Forward has explained that reasonable jurists
 6 could disagree with this Court's construction of California law regarding the crime-
 7 fraud exception, and on that basis disagree with the Court's determination that
 8 *McDermott* does not require dismissal.

9 Plaintiffs attempt to obscure this point by arguing that (1) the Director
 10 Defendants' fraudulent intent should be imputed to USAE for purposes of the crime-
 11 fraud exception, and (2) USAE has recently waived the attorney-client privilege,
 12 making the *McDermott* rule inapplicable. Neither argument withstands scrutiny.

13 **A. Reasonable Jurists Could Conclude That The Crime-Fraud**
 14 **Exception Is Inapplicable Because There Is No Evidence That**
 15 **USAE—The Client—Intended To Commit Or Aid A Crime Or**
 16 **Fraud.**

17 **1. The Director Defendants' intent cannot be imputed to USAE**
 18 **for purposes of the crime-fraud exception.**

19 California courts have consistently held that the crime-fraud exception applies
 20 only if the *client*—as opposed to the attorney or other persons—intended to use the
 21 attorney-client relationship to commit, or to enable or aid someone to commit, a
 22 crime or fraud. *Glade v. Superior Court*, 76 Cal.App.3d 738, 746 (1978) (crime-
 23 fraud exception “requires an intention on the part of the *client* to abuse the attorney-
 24 client relationship”) (emphasis added); *People v. Clark*, 50 Cal.3d 583, 622-23
 25 (1990); *State Farm Fire & Casualty Co. v. Superior Court*, 54 Cal.App.4th 625, 645
 26 (1997); *Geilim v. Superior Court*, 234 Cal.App.3d 166, 174 (1991). (LF Mot. to
 27 Certify 13-14.) Here, USAE undisputedly is the client, and there is no evidence that
 28

1 USAE *itself*—as opposed to Kirkland, Arnold, or the Director Defendants—
 2 intended any wrongdoing. (LF Mot. to Certify 15-19.)

3 Plaintiffs contend that the Director Defendants’ intent to defraud should be
 4 imputed to USAE because a corporation can act only through its directors, officers,
 5 and employees or other agents. (CAM Funds Opp. 11; Defrees Opp. 19-20.) The
 6 CAM plaintiffs further contend that Kirkland’s and Arnold’s fraudulent intent
 7 should be attributed to USAE for the same reason. (CAM Funds Opp. 11.)
 8 Plaintiffs are wrong.

9 *First*, plaintiffs’ argument is untenable because—according to their own
 10 theory as alleged in the complaint—the victim of the alleged fraud was *USAE itself*.
 11 It makes no sense to say that USAE defrauded itself. The elements of fraud confirm
 12 this point: To make a prima facie showing of fraud for purposes of the crime-fraud
 13 exception, plaintiffs must prove “a false representation of a material fact, knowledge
 14 of its falsity, intent to deceive and the right to rely.” *BP Alaska Exploration, Inc. v.*
 15 *Superior Court*, 199 Cal.App.3d 1240, 1263 (1988). A person or entity cannot
 16 knowingly make a false representation to itself, nor intend to deceive itself.

17 *Second*, the Director Defendants’ intent to defraud cannot be attributed to
 18 USAE because this Court has found that the Director Defendants were acting
 19 adversely to USAE in connection with the allegedly fraudulent transactions.
 20 (4/11/12 Order 14-15 [CAM Funds Docket #139; Defrees Docket #122]; *see id.* at
 21 24.) Both with respect to application of the crime-fraud exception, and under general
 22 principles of corporate and director liability, agents cannot simultaneously have the
 23 intention to act *both* in the interest of *and* adversely to their principal.

24 Not surprisingly, research has not disclosed—and plaintiffs conspicuously do
 25 not cite—even a single decision applying the crime-fraud exception on the basis of
 26 imputation of the fraudulent intentions of corporate agents or employees, other than
 27 where those representations might benefit the corporation—precisely the opposite of
 28

1 what plaintiffs claim here, where USAE is the victim, not the beneficiary, of any
2 alleged fraud.

3 In contrast, courts impute the fraudulent intention of agents and employees to
4 the corporation when their interests were *aligned with*—or at least certainly not
5 adverse to—those of the corporation, and the attempted fraud conferred some
6 benefit *on the corporation*. For example, in *State Farm Fire & Casualty Company*
7 *v. Superior Court*, 54 Cal.App.4th 625, 647-49 (1997), the court applied the crime-
8 fraud exception where the client, an insurance company, had a policy of destroying
9 potentially relevant documents to avoid producing them in bad-faith lawsuits, and
10 company supervisors instructed employees to withhold relevant information in
11 discovery, in order to give the company an unfair advantage in litigation. Similarly,
12 in *BP Alaska Exploration, Inc. v. Superior Court*, 199 Cal.App.3d 1240, 1263-64
13 (1988), the court applied the crime-fraud exception where a corporation employed
14 its attorney to make misrepresentations to a third party, in order to dissuade it from
15 pursuing legitimate claims against the corporation. In *In re A.H. Robins Co.*, 107
16 F.R.D. 2, 14-15 (D. Kan. 1985), the court invoked the crime-fraud exception where
17 the corporate client had engaged in a scheme to conceal problems associated with its
18 Dalkon Shield contraceptive device in order to safeguard the company's sales. In *In*
19 *re Sealed Case*, 754 F.2d 395, 400-01 (D.C. Cir. 1985), the court applied the crime-
20 fraud exception where a nonprofit organization employed a systematic scheme to
21 destroy or alter evidence so as to conceal the organization's wrongdoing in the
22 courts.

23 Abundant law concerning corporate liability underscores the principle that
24 fraudulent conduct adverse to the interests of the corporation cannot be attributed to
25 the entity itself. Indeed, that is the very basis of this suit—a derivative suit asserting
26 *USAE's* claims against the Director Defendants for their fraud *against* USAE.
27 California law provides that any fraud by the Director Defendants against USAE
28 would be ultra vires, subjecting them to potential liability to USAE for violation of

1 their authority. *See* Cal. Corp. Code § 208(a); *Sammis v. Stafford*, 48 Cal.App.4th
 2 1935, 1942 (1996) (corporation may recover damages when a director engages in
 3 ultra vires acts); *see also* Cal. Corp. Code § 204(a)(10) (articles of incorporation
 4 may not limit director's personal liability to corporation for intentional misconduct,
 5 intentional violation of law, acts the director believes to be contrary to the
 6 corporation's interests, or transactions from which director derived an improper
 7 personal benefit).

8 In the context of third-party claims of fraud against corporations, California
 9 courts have recognized that the acts of officers acting adversely to the corporation
 10 and beyond their authority are not chargeable to the corporation, observing that "a
 11 corporation is not chargeable with the knowledge of an officer who collaborates
 12 with an outsider to defraud it." *Saks v. Charity Mission Baptist Church*, 90
 13 Cal.App.4th 1116, 1138 (2001); *see also Meyer v. Glenmoor Homes, Inc.*, 246
 14 Cal.App.2d 242, 264 (1966) (same quote; corporation was not estopped to deny
 15 contract made by its officer; "an officer's knowledge is not imputed to the
 16 corporation when he has no authority to bind the corporation relative to the fact or
 17 matter within his knowledge").

18 Similarly, under the doctrine of respondeat superior, a corporation's liability
 19 for its employee's torts depends in part on whether the employee or agent's motive
 20 was "to benefit himself personally rather than the corporation," and on whether the
 21 tort foreseeably arose from the employee's duties. *Saks*, 90 Cal.App.4th at 1139. If
 22 the employee was obviously acting for his own benefit or the benefit of others,
 23 rather than for the corporation, his actions did not arise from his or her normal duties
 24 on behalf of the corporation. *Id.*; *see also Shapoff v. Scull*, 222 Cal.App.3d 1457,
 25 1466 (1990) (liability of a corporation's director or manager for tortiously
 26 interfering with corporation's contracts "depends upon whether he was acting to
 27 protect the interests of the entity"; director or manager can be deemed to be acting
 28 on behalf of the corporation only if he or she "was acting to protect the entity's

1 interest”), *overruled on other grounds by Applied Equipment Corp. v. Litton Saudi*
 2 *Arabia, Ltd.*, 7 Cal.4th 503, 521 n.10 (1994).

3 Finally, where a corporation sues its attorney or other fiduciary for failing to
 4 prevent the corporation’s officers from committing fraud, and the defendant
 5 contends that the officers’ wrongdoing estops the corporation from bringing the suit,
 6 the Ninth Circuit has held under California law that the officers’ knowledge cannot
 7 be attributed to the corporation if the officers “were acting adversely to [it] and not
 8 on its behalf”—in other words, if “the insiders, rather than the corporation,
 9 benefit[ted] from the wrongdoing.” *FDIC v. O’Melveny & Myers*, 969 F.2d 744,
 10 750 (9th Cir. 1992), *rev’d on other grounds*, 512 U.S. 79 (1994), *on remand*, 61
 11 F.3d 17, 19 (9th Cir. 1995) (adopting reasoning from original opinion).¹

12 In short, the allegedly fraudulent intent of the Director Defendants—and,
 13 *a fortiori*, of Kirkland and Arnold, who were not directors, officers or employees of
 14 USAE—cannot be imputed to USAE for purposes of the crime-fraud exception.

15 **2. There is no other basis for applying the crime-fraud**
 16 **exception.**

17 Plaintiffs argue that the crime-fraud exception may apply where the client
 18 joins in a crime or fraud initiated by the attorney. (CAM Funds Opp. 10-11; Defrees
 19 Opp. 19.) True, but irrelevant: The alleged wrongs were committed not *by* USAE,
 20 but against it. It cannot have “joined” a crime or fraud of which it was the victim.
 21 *People v. Superior Court (Bauman & Rose)*, 37 Cal.App.4th 1757, 1768 n.4 (1995),
 22 cited by plaintiffs, is not to the contrary: The cited language addresses the situation
 23 where, even though the attorney initiates the wrongful conduct, “the relationship is
 24

25 ¹ Numerous federal courts, applying both state and federal law, have held
 26 similarly. *E.g.*, *Schacht v. Brown*, 711 F.2d 1343, 1347-48 (7th Cir. 1983)
 27 (wrongdoing of insurer’s directors and officers did not estop insurer’s liquidators
 28 from suing insurer’s accountants, where directors essentially committed fraud
 against insurer); *Kempe v. Monitor Intermediaries, Inc.*, 785 F.2d 1443, 1444 (9th
 Cir. 1986) (following *Schacht*); *Askanase v. Fatjo*, 828 F.Supp. 465, 470-71 (S.D.
 Tex. 1993) (collecting cases).

1 perpetuated by criminal activity and the client takes an active part in it”
 2 —impossible where, as here, the client is the victim.

3 Plaintiffs further argue that under Luce Forward’s theory, the crime-fraud
 4 exception could never apply in the derivative context, and assert that *Favila v.*
 5 *Katten Muchin Rosenman LLP*, 188 Cal.App.4th 189 (2010), establishes that the
 6 crime-fraud exception can apply in a derivative action so as to preclude application
 7 of *McDermott*. (CAM Funds Opp. 12-13; Defrees Opp. 22.) But Luce Forward has
 8 not contended that the crime-fraud exception can *never* apply in the derivative
 9 context. Rather, Luce Forward submits that under the governing law the crime-
 10 fraud exception cannot apply where there are no allegations, let alone evidence, that
 11 the *corporation itself* attempted to defraud third parties. *Cf. Richelson v. Yost*, 738
 12 F.Supp.2d 589, 592-94 (E.D. Pa. 2010) (derivative action alleging that directors and
 13 officers breached fiduciary duties by engaging corporation in scheme to offer illegal
 14 kickbacks to medical providers to increase prescription drug sales, resulting in
 15 litigation against corporation for fraud). (LF Mot. to Certify 18.)

16 Moreover, *Favila* does not help plaintiffs because the court there did not hold
 17 that the crime-fraud exception applied, but merely that the issue remained open on
 18 remand. In *Favila*, the estate of the founder of a closely-held corporation filed an
 19 individual action against the corporation’s other shareholder and a third party for
 20 conversion, breach of fiduciary duty and fraud. 188 Cal.App.4th at 197. The estate
 21 also filed a derivative action against the shareholder, the corporation’s attorneys,
 22 and the third party for professional negligence, breach of fiduciary duty and related
 23 claims. *Id.* at 198. The trial court held in the individual action that the estate had
 24 not established the crime-fraud exception, and reaffirmed that ruling in the
 25 derivative action. *Id.* at 220. The court sustained the attorneys’ demurrer to the
 26 derivative action on the grounds that the estate lacked standing and that in any case,
 27 *McDermott* required dismissal. *Id.* at 205. The appellate court reversed, holding
 28 that the estate had standing, and remanded to allow the trial court to determine

1 whether the crime-fraud exception applied so as to preclude application of
 2 *McDermott*. *Id.* at 220-21. The appellate court noted that because the individual
 3 action had continued while the derivative action was on appeal, the trial court should
 4 now be able to determine whether the estate had submitted any additional evidence
 5 to establish the crime-fraud exception (or whether the privilege had been waived).
 6 *Id.* at 221-22.

7 In short, *Favila* did not actually *apply* the crime-fraud exception; it simply
 8 remanded the issue to the trial court for determination. The court never reached the
 9 issue of whether any individual's fraudulent intent was attributable to the
 10 corporation. Moreover, the court assumed that evidence presented in the individual
 11 action—not the derivative action—would determine whether the crime-fraud
 12 exception applied. Thus, *Favila* does not help plaintiffs establish the crime-fraud
 13 exception here, where the case is essentially in the pleading stage and there are no
 14 allegations, let alone evidence, that USAE intended to defraud third parties.

15 Finally, plaintiffs argue that new evidence submitted in connection with the
 16 bond motions filed by the Director Defendants and USAE, as well as the Akin
 17 Gump Memo, supports the complaints' factual allegations. (CAM Funds Opp. 12
 18 n.8; Defrees Opp. 17.) But none of this purported evidence establishes the crime-
 19 fraud exception, because at most, it suggests fraud perpetrated *against* USAE by
 20 Arnold, Kirkland, and the Director Defendants—not *by* USAE, the client.

21 **B. USAE Has Not Waived the Attorney-Client Privilege As To Its**
 22 **Communications With Luce Forward.**

23 Plaintiffs argue that even if the crime-fraud exception is inapplicable,
 24 *McDermott* does not require dismissal because USAE has waived the attorney-client
 25 privilege as to its communications with Kirkland and Luce Forward. Specifically,
 26 plaintiffs argue that the Director and Independent Contractor Defendants' motion for
 27 a bond included declarations and exhibits containing privileged communications
 28 between Kirkland and USAE, and USAE relied on those materials to support its

own motion for bond. (CAM Funds Opp. 13-14; Defrees Opp. 21-22.) In particular, The Defrees plaintiffs point to a conflict waiver letter from Kirkland and Luce Forward to USAE (Defrees Opp. 21); the CAM plaintiffs identify several additional documents such as e-mails between Kirkland and persons associated with USAE (CAM Funds Opp. 14 [citing, e.g., Declaration of John Kirkland in Support of Defendants' Motion for a Bond (CAM Funds Docket #162, at ECF pages 9, 22)]). Plaintiffs contend that by relying on these documents, USAE has waived the privilege as to all of its confidential communications with Luce Forward. Plaintiffs are wrong.

1. There has been no waiver.

USAE has not waived any privilege as to these documents because the Court had previously determined that the documents were not privileged. This Court held in its April 11, 2012 order that the crime-fraud exception negated the attorney-client privilege as to USAE's communications with Kirkland (and presumably other Luce Forward attorneys). (4/11/12 Order 23-25.) The order also placed into the open record all previously sealed documents disclosing communications between Luce Forward and USAE, including an otherwise privileged engagement agreement between Luce Forward and USAE that had previously been produced only in redacted form. (4/11/12 Order 25 [citing Defrees Docket #54-55, 111-12; CAM Funds Docket #62-63, 126, 128].) The Director and Independent Contractor Defendants filed their motion for bond on May 7, 2012 (*see* CAM Funds Docket #158; Defrees Docket #144), and USAE filed its motion on June 14, 2012 (*see* CAM Funds Docket #176; Defrees Docket #167). Thus, USAE had to operate under the assumption that the Court had already ruled that its confidential communications with Luce Forward were not privileged. (*See* Cal. Evid. Code § 956 ["There is no [attorney-client] privilege" if the crime-fraud exception applies].)

California courts have held that if a party discloses privileged information in reliance on a trial court's erroneous ruling, the disclosure is considered involuntary and does not constitute a waiver. *See People v. Aguilar*, 218 Cal.App.3d 1556, 1564-65 (1990), *overruled in part on other grounds by People v. Ervin*, 22 Cal.4th 48, 91 (2000) (disclosure of privileged information occasioned by trial court's erroneous application of statute did not waive privilege). Similarly, where a party voluntarily discloses confidential attorney-client communications in the good-faith but erroneous belief that those communications are not privileged, the party has not waived the privilege. *Wells Fargo Bank v. Superior Court*, 22 Cal.4th 201, 211-12 (2000) (where law was unsettled and trustee voluntarily disclosed attorney-client communications regarding trust administration apparently believing that disclosure was required, privilege was not waived as to other such documents not yet disclosed, and appellate court's determination that disclosure was not required warranted relief from disclosures already made); *see also* Cal. Evid. Code § 919(b) ("If a person authorized to claim the privilege claimed it, whether in the same or a prior proceeding, but nevertheless disclosure erroneously was required by the presiding officer to be made, neither the failure to refuse to disclose or the failure to seek review of the order . . . requiring disclosure indicates consent to the disclosure or constitutes a waiver").

Here, since this Court had already determined that the crime-fraud exception negated the privilege as to USAE's communications with Kirkland, USAE's reliance on its confidential communications with Luce Forward attorneys did not constitute a waiver of the privilege in the event that the Ninth Circuit (or this Court) later determines that this Court's ruling was erroneous.

2. Any waiver is limited to documents already disclosed.

Even if USAE had waived the privilege by relying on the documents identified by plaintiffs, the waiver would be limited to those particular documents. Under California law, disclosure of a privileged communication waives the privilege

1 only with respect to that particular communication. Other privileged
 2 communications in the same attorney-client relationship are unaffected even if they
 3 relate to the same subject matter. *Owens v. Palos Verdes Monaco*, 142 Cal.App.3d
 4 855, 870-71 (1983) (disclosure of certain privilege documents concerning
 5 transaction did not waive attorney-client privilege as to the confidential
 6 communications regarding the same transaction), *overruled on other grounds by*
 7 *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 521 n.10
 8 (1994); William E. Wegner et al., Cal. Practice Guide: Civil Trials & Evidence
 9 ¶ 8:1907 (The Rutter Group 2011); *see* Cal. Evid. Code § 912(a) (attorney-client
 10 privilege “is waived with respect to *a communication* protected by the privilege if
 11 any holder of the privilege . . . has disclosed a significant part of the
 12 communication”) (emphasis added).

13 The Defrees plaintiffs cite *Handgards, Inc. v. Johnson & Johnson*, 413
 14 F.Supp. 926, 929 (N.D. Cal. 1976), for the proposition that “[v]oluntary disclosure
 15 of part of a privileged communication is a waiver as to the remainder of the
 16 communication about the same subject” (Defrees Opp. 21), but that case applied
 17 federal privilege law, and this Court has already ruled that California law governs
 18 the attorney-client relationship between USAE and Luce Forward (4/11/12 Order
 19 21-23).

20 Here, to the extent USAE has waived any privilege, the waiver is limited to
 21 the documents actually disclosed. It does not extend to *all* confidential
 22 communications between USAE and Luce Forward attorneys regarding the matters
 23 alleged in plaintiffs’ complaints. Since Luce Forward cannot defend itself
 24 effectively without full access to such communications as evidence, *McDermott*
 25 requires dismissal.
 26
 27
 28

**III. THE MOTION IS TIMELY, AND LUCE FORWARD HAS NOT
WAIVED ANY ARGUMENT ON THE CRIME-FRAUD EXCEPTION.**

A. Luce Forward's Motion Is Timely.

Plaintiffs argue that Luce Forward's motion should be denied as untimely because it was filed 56 days after the Court's order. (CAM Funds Opp. 2-3; Defrees Opp. 8-10.) This argument is meritless.

As plaintiffs concede, Section 1292(b) contains no explicit deadline for filing a motion to certify an appeal, nor has the Ninth Circuit established one. The Seventh Circuit has stated that the motion must simply be filed "within a *reasonable time* after the order sought to be appealed." *Ahrenholz v. Board of Trustees of University of Illinois*, 219 F.3d 674, 675 (7th Cir. 2000). One court, surveying numerous cases, has concluded that "courts have consistently granted parties leeway in seeking certification," and delays under three months have generally been found to be timely. *Abbey v. United States*, 89 Fed. Cl. 425, 430 (2009); *see American Management Systems, Inc. v. United States*, 57 Fed. Cl. 275, 276 (2003) (permitting certification after an over two-month delay, with no mention of timeliness); *Vereda, Ltda. v. United States*, 46 Fed. Cl. 569 (2000) (granting certification after three-month delay with no discussion of timeliness; *see Vereda, Ltda. v. United States*, 46 Fed. Cl. 12 (1999)); *Marriott International Resorts, LP v. United States*, 63 Fed. Cl. 144, 145-47 (2004) (granting certification after 74 days, after a stay allowing party to decide whether to seek certification), *rev'd on other grounds*, 437 F.3d 1302 (Fed. Cir. 2006); *Crossland Federal Savings Bank v. Tulip Realty Associates*, 1995 WL 87358, at *3 (E.D.N.Y. Feb. 16, 1995) (granting motion for certification filed over four months from order); *Giddes v. Claims Falls Ins. Co.*, 2003 WL 23486911, at *1 (M.D. Fla. Aug. 5, 2003) (finding two-month delay timely).

Given the lack of any clear deadline for filing the motion, as well as the time needed to research, draft, edit and finalize a clear, comprehensive motion fully addressing the issues, Luce Forward was not dilatory in filing its motion. Moreover,

1 the case has been relatively dormant, with no discovery having been conducted, so
 2 plaintiffs have not been prejudiced by the passage of less than two months.

3 **B. Luce Forward Has Not Waived Any Argument On The Crime-**
 4 **Fraud Exception.**

5 Plaintiffs argue that Luce Forward has waived the argument that the crime-
 6 fraud exception applies only where the client corporation, as opposed to other
 7 persons, intended to commit a crime or fraud. (CAM Funds Opp. 14-15; Defrees
 8 Opp. 18-19.) This argument is meritless: Luce Forward had no reason to urge the
 9 argument before, because *plaintiffs themselves* focused on client intent, and the
 10 court's ruling went beyond what the parties had argued.

11 Here is the background:

12 • Luce Forward argued in its motion to dismiss that under *McDermott*,
 13 a derivative action against the nominal defendant corporation's outside counsel
 14 cannot proceed unless the corporation waives the attorney-client privilege as to its
 15 communications with such counsel, and because USAE had not waived the
 16 privilege, plaintiffs' actions against Luce Forward must be dismissed. (Luce
 17 Forward's Motion to Compel Arbitration or Dismiss the Action 6-8 [CAM Funds
 18 Docket #62; Defrees Docket #54] [hereinafter "LF Mot. to Dismiss"].)

19 • In opposition, plaintiffs argued that the crime-fraud exception negated the
 20 attorney-client privilege so as to permit disclosure of communications between
 21 USAE and Luce Forward. (CAM Funds' Opp'n to LF Mot. to Dismiss 19-21
 22 [CAM Funds Docket #69]; Defrees' Opp'n to LF Mot. to Dismiss 22-23 [Defrees
 23 Docket #58].) Plaintiffs relied solely on the complaints' allegations of purported
 24 wrongdoing. (CAM Funds' Opp'n to LF Mot. to Dismiss 20; Defrees' Opp'n to LF
 25 Mot. to Dismiss 23.) Moreover, Defrees plaintiffs specifically noted that for
 26 purposes of the crime-fraud exception, the client's intent was controlling. (Defrees'
 27 Opp'n to Mot. to Dismiss 23 [“[I]t is the intent of the client upon which attention
 28

1 must be focused””; citing *State Farm & Casualty Co.*, 54 Cal.App.4th 625, 645
 2 (1997)].)

3 • In its reply, Luce Forward argued that it was plaintiffs’ burden to establish
 4 the crime-fraud exception by presenting evidence rather than mere assertions, and
 5 plaintiff had not proved or even pleaded particularized facts to support the
 6 exception. (Luce Forward’s Reply in Support of LF Mot. to Dismiss 21-22 [CAM
 7 Funds Docket #126; Defrees Docket #111].)

8 • In its order denying Luce Forward’s motion to dismiss, the Court ruled that
 9 the crime-fraud exception negated the privilege as to communications between
 10 USAE and Kirkland. (4/11/12 Order 23-25.) The Court went beyond the
 11 complaints’ allegations, on which plaintiffs had relied, and construed the Akin
 12 Gump Memo as evidence supporting the complaints. (4/11/12 Order 24.)

13 Luce Forward adequately addressed the crime-fraud exception by arguing that
 14 plaintiffs had not met their burden of presenting evidence to establish the
 15 exception—an argument that encompassed the point that there was no evidence that
 16 the client intended to commit a crime or fraud. Moreover, until the Court issued its
 17 order, Luce Forward had no reason to anticipate that the Court would rely on the
 18 Akin Gump Memo as evidence of fraud, or overlook that the intent of the client—
 19 USAE—was controlling, particularly since plaintiffs’ opposition papers had already
 20 noted that the client’s intent controlled. Thus, Luce Forward did not waive the
 21 issue.

22 Moreover, as plaintiffs note, even if an issue was not properly raised below,
 23 the Ninth Circuit has discretion to consider the issue “in the exceptional case in
 24 which review is necessary to prevent a miscarriage of justice or to preserve the
 25 integrity of the judicial process,” or “when the issue presented is purely one of law
 26 and either does not depend on the factual record developed below, or the pertinent
 27 record has been fully developed.” *In re Mercury Interactive Corp. Securities*
 28 *Litigation*, 618 F.3d 988, 992 (9th Cir. 2010) (internal quotation marks omitted).

1 This case is “exceptional” because Luce Forward could not have anticipated the
 2 Court’s ruling, and the Court arguably made an error of law. Further, the Court’s
 3 construction of California law presents a pure issue of law, and the record is fully
 4 developed: Since plaintiffs raised the crime-fraud exception in their opposition and
 5 presented all of their purported “evidence”—i.e., the complaints—they would not
 6 have presented any additional evidence even if Luce Forward had raised additional
 7 arguments in its reply.

8 CONCLUSION

9 For the reasons stated above and in Luce Forward’s motion, the Court should
 10 certify its order of April 11, 2012 for an immediate appeal.

11
 12 Respectfully submitted,

13 Dated: July 16, 2012

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